

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 5, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-0406-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ELBERT WHITELAW,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Elbert Whitelaw appeals a judgment of conviction following a court trial of two counts of first-degree sexual assault of a child. See § 948.02(1), STATS. Whitelaw also appeals from the trial court's order denying his postconviction motion for a new trial. Whitelaw was sentenced to three years in prison on the first count. On the second count, the trial court withheld sentence and ordered ten years probation consecutive to the time served on the

first count. His counsel filed a no merit report pursuant to Rule 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Whitelaw received a copy of the report and has filed a response.

The no merit report identifies the following potential issues: Did the trial court erroneously (1) permit the State to file an amended information on the day of trial that added a second count of first-degree sexual assault; (2) deny cross-examination of the victim's sexual history; (3) determine that the evidence was sufficient to support the conviction; (4) deny a new trial and (5) exercise its sentencing discretion. The no merit report correctly describes the issues it identifies and provides a correct analysis. Based upon our independent review of the record, we agree with the no merit's conclusion that these issue are without arguable merit.

Whitelaw's response raises the following issues: (1) Was he deprived of effective assistance of trial counsel and (2) did the trial court erroneously consider polygraph results after ruling them inadmissible. This court ordered a supplemental report to address these issues. Counsel filed a supplemental report, and Whitelaw responded. Based upon our independent review of the record, we conclude that the issues Whitelaw identifies are without arguable merit. We begin our analysis with a summary of the record.

I. PRE-TRIAL PROCEEDINGS

The criminal complaint charged one count of first-degree sexual assault, contrary to § 948.02(1), STATS. The factual section, however, recited two incidents of sexual contact with the twelve-year-old victim. The first was that Whitelaw inserted his finger into her vagina, and the second was that one week later he inserted his penis into her vagina.

At the preliminary hearing, the victim, L.A., testified that she was twelve years of age when Whitelaw came into her bedroom on two occasions. On the first occasion, a Sunday, he pulled her covers off, fondled her breasts under her clothing, and put his finger in her vagina. On the second occasion, a week later, a Saturday, at 12:45 a.m., he pulled the covers back and started fondling her breasts. L.A. testified: "[H]e pulled me to the end of the bed and he was about to stick his penis in me." His penis came in contact with her vagina, and she pushed him away. Her mother was home at the time, but not in the same room with them. L.A. testified that on both occasions, her overhead light was on. She did not shout out for her mother.

On February 19, 1993, the State filed its motion to amend the information to include a second count. The trial court granted the motion on the first day of trial. The amended information charged Whitelaw with two counts first-degree sexual assault of a child: Count one states that on Sunday in November or December 1991, Whitelaw had sexual intercourse with the child victim, L.A. (d.o.b. 8/7/79), who had not attained the age of thirteen years; count two states that on a day in November or December 1991, Whitelaw had sexual contact with the victim.

The record shows that after a lengthy colloquy, the trial court accepted a valid jury trial waiver from Whitelaw, age thirty-four, a high school graduate with some college education who had been employed fifteen years as a forklift driver.

II. TRIAL

The trial before the court was October 29, November 1 and November 2, 1993. The prosecution stated that it intended to prove

finger/vaginal intercourse and penis/vagina contact. The court permitted the amendment to the information, by way of adding the second count, under *Whitaker v. State*, 83 Wis.2d 368, 265 N.W.2d 575 (1978). The trial court granted the State's motion in limine to prohibit questioning the victim concerning alleged use of birth control pills and alleged prior sexual activity, under the rape shield law, § 972.11, STATS.

Five witnesses testified at trial: the victim's mother; the victim, Marlene Putz, a registered nurse; Judith DeGroot, a psychotherapist; Elbert Whitelaw, the defendant, and Kathleen Schnagel, an investigating officer. A summary of their testimonies follows.

The victim's mother testified that Whitelaw had been her husband for the last four years. In early 1992, after a doctor's exam, she asked her daughter, L.A., what had happened because "the doctor said that her tissues were torn." She testified that L.A. was crying and said "he did it" meaning the defendant, Whitelaw. The mother did not call the police immediately, but moved to her mother's house with L.A. Although she questioned L.A. three times, L.A. never recanted.

In response to the question "At any point in time, did Mr. Whitelaw indicate to you that he did this"? L.A.'s mother answered "Um—I would think one—at one time after After he took the lie detector test, he came back to me and he told me that He said he was sorry about the situation."

At the time of the trial, L.A. was fourteen and in the ninth grade. She testified that in November 1991 she had been watching television when Whitelaw entered her bedroom and "as he was going to say goodnight, he pulled back the covers and he kissed me on the forehead and his exact words was, 'This will not only hurt me, it will kill your mother.' ... I don't know which finger it was, but he stuck it into my vagina." She testified that she was wearing a slip, bra and panties and that he pulled her slip up. He also touched her breasts with his hand. On the second occasion, he pulled her legs to the end of her bed and put his penis halfway into her vagina. She pushed him back with her feet and he left. He touched her breasts the second time under her gown. She decided not to tell her mother but to go to stay at her grandmother's, where she often stayed due to her mother's work schedule.

On cross-examination, L.A. testified that she had previously told hospital personnel and her mother that she "had had sex with nobody." She conceded that she lied to her mother and the hospital. She also testified that during both assaults she had only the night light on.

Marlene Putz, a registered nurse, testified that she was present at L.A.'s post-assault medical exam when L.A. denied she had been assaulted. L.A. denied sexual contact of any kind. During the pelvic exam, old hymen tears were noted. The tears were consistent with some form of penetration, such as by a finger, a penis or an object.

Judith DeGroot, a psychotherapist, testified that she had been seeing L.A. for emotional problems during the pending prosecution and that L.A. was dealing with conflicting emotions concerning the prosecution.

Whitelaw testified in his own defense. He testified that he was the one who initially called the police to clear up L.A.'s false allegations. He testified that he told his wife to tell L.A. that he was sorry that he was going to the police to clear his name, despite L.A.'s desire not to prosecute. Whitelaw denied assaulting L.A.

Deputy Kathleen Schnagel testified that when discussing the results of the polygraph with Whitelaw, he denied the assault allegations and repeatedly said that if he did it, he didn't remember. After further argument, the trial court ruled that Schnagel's testimony concerning Whitelaw's statements was inadmissible.

L.A.'s mother was recalled to clarify the time frame when Whitelaw made the statement that began with the words, "I'm sorry." She testified that it occurred after the polygraph, because he told her that he failed the polygraph and to tell her daughter he is sorry. Trial counsel objected and moved for a mistrial. The court struck the comments on the polygraph results and ruled them inadmissible. It denied the motion for a mistrial. In rebuttal, Whitelaw testified that he told his wife to tell L.A. that he was sorry he was going to the police, and that he told the investigating officer that he is not crazy and if he did it he would have remembered it.

The trial court found Whitelaw guilty beyond a reasonable doubt as charged. The trial court characterized this case as presenting a clear matter of credibility. The court found the victim to be the more credible witness. The trial court concluded that the victim's testimony was consistent, and that the medical testimony was convincing. The trial court also found the victim's mother's testimony credible, concluding that Whitelaw said the words "I'm sorry" after the police became involved. The trial court also observed that Whitelaw's demeanor was less convincing because he took long pauses and looked away after being asked a question. The trial court found credible the victim's testimony that Whitelaw said that this would kill her mother.

III. POSTCONVICTION PROCEEDINGS

Whitelaw's postconviction motion, filed August 10, 1994, requested a new trial in the interest of justice. It was denied without a hearing. The basis of the postconviction motion was a statement of a relative, Luches Hamilton, that L.A. had told him the assault had not occurred. On June 9, 1994, Whitelaw advised appellate counsel that he believed that L.A. had recanted to Hamilton. Hamilton's affidavit and interview with an investigator, dated July 6, 1994, is attached to the motion. Hamilton stated that L.A. was his great-niece and came to visit his home in Minnesota in 1993. He did not remember the date, but thought it was winter time and cold. He thought it was before the trial, but was not sure. He was not advised of the court dates. He stated that L.A. told him that she made up the allegations of sexual assault to get her mother and father back together.

Both L.A. and her mother filed affidavits in response to Whitelaw's motion. The mother's affidavit states that before the trial in this matter, she and Whitelaw were living together. L.A. was sent to an uncle's house for a visit. While L.A. was there, L.A. was pressured into recanting her allegations. By telephone, Hamilton told the mother and Whitelaw that "it was all taken care of. [L.A.] says that it's not Elbert." L.A.'s affidavit admits she recanted to her uncle, but that her trial testimony was the truth; the recantation was not.

Whitelaw did not dispute that he knew of the recantation before trial. His postconviction motion argued that the real controversy was not tried and a new trial should be granted in the interest of justice. In a memorandum opinion, the trial court analyzed the documentation submitted and concluded

that a hearing was not necessary. It observed that Whitelaw was not challenging any factual submissions in the State's affidavits. Rather, Whitelaw's postconviction motion asked the court to reevaluate witness credibility in light of the recantation evidence.

The trial court observed that at trial, Whitelaw attacked L.A.'s credibility and had nearly unrestricted access to cross-examine witnesses. The court concluded that the recantation did nothing to change the court's credibility evaluation, there was no need for an evidentiary hearing, there was no substantial probability of a different result and the credibility issue was fully tried. It denied the postconviction motion.

IV. DISCUSSION

1. Amended Information

Whitelaw's theory of defense was that L.A. fabricated the accusations to explain the medical evidence of sexual activity with a boyfriend. There is no indication that permitting the amendment to the information adding the second count prejudiced Whitelaw's ability to conduct his defense. Because the State filed its motion to amend the information six months before trial, and because the second count was based upon allegations made in the complaint and evidence adduced at the preliminary hearing, the trial court reasonably exercised its discretion by permitting the information to be amended the day of trial. *Whitaker v. State*, 83 Wis.2d 368, 373-74, 265 N.W.2d 575, 578-79 (1978).

2. Rape shield law

Whitelaw sought to cross-examine the victim to uncover her sexual history. He claimed that her sexual history was relevant to prove that hymen tears were caused by sexual activity with another. The trial court ruled that § 972.11, STATS., precluded cross-examination into the victim's sexual history. Under analogous facts, our supreme court rejected a similar argument, stating:

Insofar as [the neighbor's] testimony was to suggest that "someone else," i.e., David, sexually assaulted Laura, the evidence is irrelevant Evidence going to prove one sexual encounter does not assist the trier of fact in determining whether a separate sexual encounter also occurred—the two events are not mutually exclusive.

Michael R.B. v. State, 175 Wis.2d 713, 726, 499 N.W.2d 641, 647 (1993). The court considered that "[o]ne generally presumes that an eight-year old child does not have a sexual history. Therefore, if confronted with physical evidence to the contrary one may unjustly infer that the child must have been sexually assaulted on the occasion at issue in the litigation." *Id.* at 728, 499 N.W.2d at 647. Nonetheless, the court concluded that § 972.11, STATS., was enacted to prevent scrutiny of the victim's prior sexual conduct, including absence of sexual activity, except for determining the origin of semen, pregnancy, disease or injury. It concluded that a dilated hymen is not within the statutory exceptions. *Id.* at 728-29, 499 N.W.2d at 648.

The court further rejected a sixth amendment confrontation claim, using the analysis from *State v. Pulizzano*, 155 Wis.2d 633, 456 N.W.2d 325 (1990). Using the same analysis, Whitelaw's claim must also be rejected. To introduce relevant but excluded evidence, a defendant must make an offer of proof that (1) the prior act clearly occurred; (2) the act closely resembles those at issue; (3) the act is relevant; (4) the evidence is necessary to the defense, and (5) the probative value outweighs the prejudicial effect. *Michael R.B.*, 175 Wis.2d at 736, 499 N.W.2d at 651. Here, Whitelaw made no offer of proof, and does not now, that L.A. was victimized by another. Because there is no offer of proof of a prior act, under a *Pulizzano* analysis, an argument that the trial court erroneously restricted the scope of Whitelaw's cross-examination is without arguable merit.

3. Sufficiency of the evidence

The trial court, not the appellate court, assesses weight and credibility. An appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value that it can be said as a matter of law that no trier

of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). The record reveals no issue of arguable merit challenging the sufficiency of the evidence.

4. Denial of post-conviction relief

Whitelaw moved for a new trial based upon newly discovered evidence and in the interests of justice, on the basis that L.A. had recanted her accusations. The trial court denied Whitelaw's motion without a hearing. An evidentiary hearing is required if sufficient facts are alleged to raise a question of fact. *State v. Toliver*, 187 Wis.2d 345, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). The record fails to disclose a disputed issue of fact to require an evidentiary post-conviction hearing.

Whitelaw's post-conviction motion was accompanied by a transcript of an interview with L.A.'s great uncle to whom she had recanted. The State filed L.A.'s affidavit that explained she had recanted while visiting her great uncle before trial, but that the recantation was false. L.A.'s mother's affidavit discloses that Whitelaw was informed of the recantation before trial. Thus, there is no factual dispute that L.A. had recanted and Whitelaw knew of L.A.'s recantation before trial. Because the evidence was available to Whitelaw before trial, it was not newly discovered and, as a result, Whitelaw is not entitled to a new trial on the basis of newly discovered evidence. See *State v. Sarinske*, 91 Wis.2d 14, 37, 280 N.W.2d 725, 735-36 (1979).

A new trial in the interest of justice is not warranted. Although the fact of the recantation was not disputed, "[a]bsent other newly discovered evidence, [defendant's stepdaughter's] recantation [of her accusations of sexual assault] is not sufficient reason to order a new trial." *State v. Marcum*, 166 Wis.2d 908, 928, 480 N.W.2d 545, 555 (Ct. App. 1992). It is well-established Wisconsin law that "recanting affidavits, standing alone, are of no legal significance." *Nicholas v. State*, 49 Wis.2d 683, 694, 183 N.W.2d 11, 17 (1971). Because the record fails to reveal any form of corroboration, the uncle's statements do not warrant a new trial in the interest of justice. See also *Zillmer v. State*, 39 Wis.2d 607, 616, 159 N.W.2d 669, 673 (1968).

5. Sentencing

The record discloses no issue of arguable merit with respect to sentencing. Sentencing lies within the trial court's discretion, and our review is limited to whether the trial court properly exercised its discretion. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). Out of a possible forty-year sentence, § 939.50(3)(b), and § 948.02(1), STATS., Whitelaw received three years in prison and ten years probation. The record discloses that the trial court considered the proper factors and reasonably exercised its sentencing discretion.

6. Ineffective assistance of trial counsel

Whitelaw argues that he was denied effective assistance of trial counsel because his trial counsel failed to produce relevant evidence at trial. Wisconsin uses a two part test to review ineffective assistance of counsel, set out in *Strickland v. Washington*, 466 U.S. 668 (1983). The first prong focuses on trial counsel's performance and requires that the defendant show that counsel's performance was deficient. *State v. Tatum*, 191 Wis.2d 548, 555, 530 N.W.2d 407, 409 (Ct. App. 1995). The second prong requires a showing that the deficiencies were prejudicial; that is, serious enough to render the resulting conviction unreliable. *Id.* Whether counsel's performance is prejudicial is a question of law we review de novo. *State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985). If the defendant is unable to show one prong, the court need not address the other. *Strickland*, 466 U.S. at 697.

The record discloses no *Machner* hearing. See *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Therefore, we must review Whitelaw's motions and affidavits to determine whether questions of fact are raised that necessitate a hearing. *Tatum*, 191 Wis.2d 551 n.2, 530 N.W.2d at 408 n. 2. Because the record shows that Whitelaw's complaints of ineffective assistance of counsel fail to satisfy the prejudice prong under *Strickland*, we conclude that his contentions do not require an evidentiary hearing and are without arguable merit.

First, Whitelaw argues that trial counsel was ineffective for failing to produce at trial evidence of L.A.'s recantation. Although Whitelaw knew of the recantation before trial, Whitelaw fails to assert that he advised trial counsel of this evidence. Nonetheless, we conclude that had counsel been informed of

the recantation and had neglected to call the uncle as a witness, the unique circumstances of this case render such deficiency nonprejudicial.

At trial, the court had before it the victim's denial of any sexual assault that she had made to her examining physician. Thus, the court was required to evaluate the victim's credibility not only in light of Whitelaw's denials, but also in light of the victim's denials during a medical examination. Also, the undisputed evidence of L.A.'s recantation was considered by the court at postconviction proceedings. The trial court was aware of its own mental processes in determining the credibility of trial testimony and reiterated its reasons for finding L.A.'s testimony more credible than Whitelaw's. The court concluded that the recantation would not have produced a different result. Because evidence of the victim's denial of the sexual assault was before the court at trial, and the trial court had a postconviction opportunity to consider the effect of the recantation evidence and determined that it would not undermine its confidence in conviction, we conclude that the record reveals no prejudice. Consequently, Whitelaw's contentions fail to raise an issue requiring a *Machner* hearing.

Next, Whitelaw complains that his trial counsel failed to recall him to the stand to rebut detective Schnagel's testimony that Whitelaw claimed not to have remembered the incident. The record shows that Whitelaw was called in surrebuttal and that he testified he told the detective he was not crazy and that if he had committed the assault, he would have remembered it. In any event, the trial court later excluded Schnagel's testimony. This contention is without arguable merit.

Next, Whitelaw complains that trial counsel was deficient for failing to produce evidence to cast reasonable doubt on the validity of the polygraph examination. The record fails to support this claim of error. Defense counsel objected to reference to L.A.'s mother's unsolicited reference to her understanding of polygraph results, and moved for a mistrial. The objection was sustained, and the court denied the motion for a mistrial but ruled polygraph results inadmissible. The court stated that it was confident it could sift out the inadmissible remarks and not consider them in any way. Consequently, the record reveals no arguable merit that trial counsel's performance was deficient.

Next, Whitelaw complains that trial counsel was deficient for failing to impeach L.A. with discrepancies between her preliminary hearing testimony and her trial testimony. Specifically, he argues that L.A. first stated that the overhead light was on and at trial testified that the night light was on. Also, L.A. first stated that the penis contacted her vagina and at trial stated that it was inserted halfway into her vagina. The record fails to disclose potential prejudice in view of counsel's effective cross-examination that elicited the concession that L.A. denied to her examining physician that she had been assaulted. In view of the victim's testimony that she had previously denied the assault, counsel's failure to probe more minor inconsistent statements describing the assault is not prejudicial as a matter of law. As a result, this contention would be without arguable merit.

Next, Whitelaw argues that trial counsel was ineffective for failing to cross-examine the registered nurse or the victim's mother regarding the presence of blood as a result of vaginal penetration. Because the record fails to suggest that blood is a necessary result of vaginal contact and penetration, failure to inquire about its presence or absence is not prejudicial. Consequently, this argument would not form the basis for an appeal of arguable merit.

Whitelaw next argues that trial counsel was ineffective for failing to seek out character witnesses or psychiatric testimony. Because neither Whitelaw nor the record reveals what, if any, basis existed for psychiatric testimony, his contention fails to reveal arguable merit. Whitelaw argues that his counsel should have offered character evidence that Whitelaw had babysat for numerous children and was trusted. Generally, character evidence in the form of specific acts is not admissible to show that the defendant acted in conformity therewith. *See* § 904.05, STATS. Nonetheless, testimony was received showing that Whitelaw had been alone with L.A. on numerous occasions and had not assaulted her. Therefore, character evidence that he had babysat other children and not assaulted them would have been cumulative, and counsel's failure to produce it was not prejudicial as a matter of law. This issue is without arguable merit.

Whitelaw further argues that his counsel was deficient for failing to request a presentence report. The record, however, demonstrates that trial counsel requested a presentence report, and that the court ordered one and considered it at sentencing. This issue is without arguable merit.

7. Officer Schnagel's testimony

Finally, Whitelaw claims that the trial court misinterpreted the law and permitted the polygraph examiner to testify and although the trial court ruled the examination and results inadmissible, it nonetheless considered them in making a determination of Whitelaw's guilt. The record fails to support Whitelaw's contention.

The State did not seek to admit polygraph results, but rather post-examination statements. Deputy Kathleen Schnagel testified that when discussing the polygraph results with Whitelaw, he denied the assault allegations and repeatedly said that if he did it, he did not remember. After an evidentiary showing that the post-examination statements were made near the time of the polygraph test, the court ruled the post-examination statements inadmissible. The court also sustained defense counsel's objection to the mother's unsolicited remark concerning the polygraph result and struck it from the record.

The record fails to show that the trial court considered polygraph testimony in any way in making a determination of guilt. The court's reference to the exam was made in determining the time frame in which Whitelaw made the "I'm sorry" remark to L.A.'s mother. The court found credible her testimony that the remark came subsequent to the exam and after police were involved, rather than before, as Whitelaw testified. The court did not refer to the exam results. Consequently, Whitelaw's contention is without arguable merit.

Because our independent review of the record and Whitelaw's responses to the no merit report and its supplement fail to reveal any potential appellate issue of arguable merit, we relieve attorney Patricia Flood of further representation in this matter. We affirm the judgment of conviction.

By the Court. – Judgment and order affirmed.